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Indiana Law Journal

Volume 17 | Issue 1 Article 3

10-1941

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Beryl Harold Levy
Member, New York Bar

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Recommended Citation
Levy, Beryl Harold (1941) "A Solid Chief Justice," *Indiana Law Journal*: Vol. 17: Iss. 1, Article 3.
Available at: http://www.repository.law.indiana.edu/ilj/vol17/iss1/3

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A SOLID CHIEF JUSTICE

BERYL HAROLD LEVY*

Many roads lead to the High Court: professional, professorial, political. Each adds to the multiform strength of a Court which is more than a court. Stone's endowments embrace in a measure all three categories. He combines the merits of toughened New York practitioner, lucid scholar and high-minded public servant. His basic training has been at the common law and his center of devotion remains there. By generalizing and transcending the media of the common law he has produced a Constitutional weapon in the best tradition of Taney, Miller, Holmes and Brandeis.

His English ancestors came to New Hampshire at the same time the common law was being received in America. Stone himself is made of New Hampshire farmer-stuff, plain as a denim shirt. To this day his manner is disarmingly unaffected. Like the foot-ball husky he is, he takes undisguised delight in good and plentiful food. Acquired also is a connoisseur's taste for fine wines. He makes no compromise with the second-rate. The best concerts are attended in Washington with Mrs. Stone; so also are the art galleries regularly (often with Holmes when Holmes was alive); and Shakespeare's plays whenever they offer. (When Folger left his Shakespeare collection to Amherst, Stone was Chairman of the Committee of Trustees appointed to supervise it.) Sensitivity to excellence is displayed also in his contacts with legal minds and thought. Holmes and Cardozo, it appears, were most responsible for his conversion from a position advocated in *Law and its Administration* published in 1915. This book was anonymously drubbed in a review in the *New Republic* written by Morris R. Cohen who has lived to see Stone the present object of his as of every informed admiration. In that book Stone was not comfortable with the "social justice" which was edging into the common law. It was doubtless from Cardozo that he learned most how to alter his perspective in this regard. He would not now hesitate to recommend a just result in response to social conceptions of equity even at a sacrifice of formalism or symmetry in the legal system. Cardozo was his dearly-loved

* Of the New York Bar, author of "Cardozo and Legal Thinking," "Our Constitution: Tool or Testament."

friend as he was also an early cynosure of esteem. If Stone had had his way Cardozo would probably have been on the High Court sooner.

When we mention Stone's receptivity to the influence of these liberalizing minds among his colleagues, we must not forget that his years as professor of law at Columbia, and as Dean of the Law School from 1914 to 1923, had brought him into a rapidly progressing stream of scientific study which was passing over the average lawyer. What Stone drew from his colleagues, he did not merely borrow, but transmuted into a broadening sturdiness of his own. He had not the aloof cynicism of Holmes and, being less of a technical economist than Brandeis, is now, on the whole, most like Cardozo in outlook, though in manner less gentle and in style less poetic.

While the economic brew of Coolidge and Hoover caused him no great dissatisfaction, it is not correct to regard him as without reconstructive zeal in more fields than one: legal education, financial dealings, the Bar's obligations, and certain technical branches of law. In his Dean's reports he early drew attention to those "energizing forces" which deserve more study than mere cases and doctrines. Like Brandeis and Douglas he has held aloft the fiduciary standard, old as Holy Writ, that a man cannot serve two masters at once. With a Prophetic candour he called the right names writing in 1934 in *The Harvard Law Review*. He scolded the Bar for not maintaining a position of public leadership, observing "that in the struggle, unique in our history, to determine whether the giant economic forces which our industrial and financial world have created shall be brought under some larger measure of control and, if so, what legal devices can and should be selected to that end, it is a matter of public comment that the practising lawyer has been but a minor participant."

The Devil has not been seen in New Hampshire, according to Stephen Vincent Benet's account, since Daniel Webster licked him in a famous case involving the soul of Jabez Stone. The record does not reveal whether Jabez Stone was an ancestor of the Chief Justice, but there can be no question that the New Hampshireman's conscience is manifested in the homely virtues preached and exemplified by Harlan F. Stone. The austerity of the New England mind does not

make for free and frank confession. There are consequently few revelations of the inward thoughts, economic, philosophical, or political, of Justice Stone. He remains an intellect which must be comprehended almost entirely through formal utterances: Dean's reports, judicial opinions, law review articles, celebratory addresses. On one occasion, however, he went home to New Hampshire to talk among his neighbors in the bar association there. Here he was able without diffidence to recall the traditional qualities of hard farm living in a rugged environment. Here he bewailed the current notion that through much legislation significant improvement will be made. He affirmed his faith that our reliance must not be fundamentally on law, but on morality, by which he meant mainly a sound family life and due self-discipline. Like Aristotle his primary stress is on education in the broadest sense extended to the point where it meets law to make good citizenship.

It was in 1925 and he sounded the note of warning:

"Neither leasure nor wealth are necessarily evils nor are they unmixed blessings at least before the fortunate possessor of them has learned the uses to which they should be devoted, but there is nevertheless a widespread popular belief that the leisure which comes from the freedom from the necessity to work and the acquisition of wealth without that necessity are in themselves the supreme satisfaction to be gained from human experience.

"I need not urge in this presence that these are false ideals based on a false and dangerous philosophy of life. The blind pursuit of them is nevertheless increasing the number of our population who are rapidly acquiring wealth or leisure without a compensating sense of responsibility for their wise use, and it is not surprising that there is to be found among them a growing number of those who are not overscrupulous about the methods they adopt to attain the supremely desired end."

This sense of responsible restraint also dominates his thought concerning the function of the Supreme Court. No better expression has ever been given to the proper ruling sentiment of that Court than in the brave phrases edged with irony to be found in Justice Stone's dissent in the first A.A.A. case. "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision

which ought never to be absent from judicial consciousness. One is that Courts are concerned only with the power to enact statutes, not with their wisdom. The other is that, while unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lie not to the Courts but to the ballot and to the processes of democratic government." And again: "Courts are not the only agency of government that must be assumed to have capacity to govern."

To one who thinks in terms of institutions rather than doctrines, the presumption of constitutionality, which Justice Stone is thus exalting, is merely a legalistic way of saying that, in the relative equilibrium of our government, the legislature must be given head and that courteous deference to its judgment should be shown by the courts. To Stone the presumption of constitutionality is also seen in the context of the common law. For to him it is linked with the hoary presumption of innocence in a criminal case or the presumption of regularity attaching to official conduct.

Three other aspects of common law practice are furthered and vindicated in his constitutional method: (1) confinement to the actually presented issue, (2) stress on facts, (3) supremacy of law.

(1). Not in Stone's opinions will you find much superfluity of dicta, unessential for the case decided, a shackle for later adjudication. Faithful to his true function, he will not even consider a constitutional question unless it is indispensably required in order to decide the instant case. He will then dwell on that confined question only and not pass judgment on an array of dimly related issues which must confuse and confine his successors, the bar, and the legislature.

(2) Does the common law court have the facts presented before attempting to apply the law? Stone would find in Brandeis' fact-approach not so much a novel departure but essentially a fulfillment of the centuries-old wisdom. Even when the trial has not brought out all the facts, and counsel in their briefs have been equally neglectful, Stone will set his secretary to work to amass the factual data

from which to conclude that the legislature was not acting unreasonably.

(3) The law, as enunciated and created by the High Court, is supreme over sovereign as well as subject, as Stone has emphasized. Hence civil liberties are secure from the sovereign government's interference. Lord Coke defied his royal sovereign and bade him act under the law. But Coke also knew the limits of the law's supremacy. For it is related that he had no sooner assigned the king to his place than, falling on his knees, he begged forgiveness. In a government whose people are sovereign, the general assertion of law's supremacy is good but so also is Coke's reservation and after-thought. Perhaps that is the lesson of the Court's shift after the President's threat in response to strong public feeling. While stressing the supremacy of law, Stone has evinced his recognition that its judicial enunciators are our servants, not our masters.

We are working with a legal system geared in precedents with which we must make the best shift we can to adjust the law to a dynamic society. That continuity for which, Stone stresses, we must strive is not more important than the discontinuity which is equally germane at intervals. When occasion presented, Stone has not been hesitant to step straight out. Itching for the chance to overrule the Child Labor case, which evoked Holmes' stinging dissent, Stone seized the chance not so many months ago and put the matter with straight-forward bluntness: "Should be and is now overruled." No wangling, no fudging, no conventional rationalization.

It would follow from Justice Stone's realism that jurisprudence should henceforward be focused in the *men* on the court, with full recognition of the fact that we are inevitably subject to their wisdom and, along with it, their frailty and sense of moderation. Those broad and sweeping clauses of the Constitution, which are most frequently litigated, should be wielded by them as tools, *and frankly so.* Why should we not stand straight up to the fact that judicial decisions are law; and that judicial decisions in the form of precedents may be and are openly changed according to the good sense coupled with restraint of our judges. However the process may be covered or mystified, that is what

happens none the less. It is not a question of what we like; it is simply a fact.

The great battle which Holmes, Brandeis and Cardozo waged, with Stone as their ally, as the liberal dissenting minority, has now been won. The presumption of constitutionality is now enshrined as the Court's guiding star. That goes at least for ordinary economic or commercial statutes. For legislative infringements on civil liberty, however, (as no one has grasped more vitally than Justice Stone in a significant footnote in the *Carolene* case) that presumption should be slackened. It is only when you have majority rule plus minority protection that you have true democracy, as the Fathers realized when they put the freedom of speech, assembly and petition beyond the reach of legislative diminution. Only when minorities are free to make their influence felt in a fair field, with a real chance of becoming a majority, can majority rule be said to be untyranical. In the *Flag Salute* case, Stone stood a minority of one for the fullest feasible expression of religious freedom, for he believes that our history teaches the sacred value of liberty of individual conscience, as he said when he was investigating conscientious objectors during the previous war.

The battleground for the future will not lie in the field of declaring statutes unconstitutional. It will lie rather in the field of statutory interpretation, where the court must be equally careful to see that it does not write its own conceptions into the policies of Congress. Some considerable discretion and leeway the Court will always continue to have. That is in the nature of the case because first of all, we are dealing with human beings in a human situation, and secondly, our commodity is words which allow and invite multiple interpretation. The judgment of the Court will still be tested under fire and we must not be lulled into any false sense that the "Court problem" is finished for our generation. Another battleground will be found in the extent to which the court will allow administrative bodies to work out their own techniques for dealing with complicated problems where legislators cannot pass a statute every other day and yet continuous regulation is imperative.

It is fair to say that Stone sees in administrative bodies the agency appropriate to our complex times, which accords an institutional control superior to that of the courts, and

analogous to the awakening of Equity. Stone has shaken a finger at those lawyers who play Canute today, as their forebears did in the seventeenth century, instead of bringing their thought and influence to bear upon aiding the new developments in order that both efficiency and the absence of abuse may be assured.

He is a healthy, solid, vigorous man, our new Chief Justice. In our pre-occupation with foreign events we are in danger of forgetting how central to our foreign as well as domestic policies are the Court's determinations. Stone's elevation has been over-shadowed by the war despatches. It is reassuring at the opening of the new term of the Supreme Court to consider that we have at its center a "rock of trust."